

BORA LASKIN LAW LIBRARY



3 1761 03320 6053

# INTELLECTUAL PROPERTY LAW

VOLUME ONE: COPYRIGHT

FALL 1991

Professor Rosemary J. Coombe

These materials are solely for the classroom use of students  
at the Faculty of Law, University of Toronto.

6  
171  
1  
BORA LASKIN LAW LIBRARY

SEP 5 1991

FACULTY OF LAW  
UNIVERSITY OF TORONTO

INTELLECTUAL PROPERTY LAW

VOLUME ONE: COPYRIGHT

FALL 1991

Professor Rosemary J. Coombe

These materials are solely for the classroom use of students  
at the Faculty of Law, University of Toronto.



Printed on  
Recycled Paper



Digitized by the Internet Archive  
in 2018 with funding from  
University of Toronto

INTELLECTUAL PROPERTY LAW  
VOLUME ONE: COPYRIGHT

TABLE OF CONTENTS

A. HISTORY AND POLICY CONSIDERATIONS

Quote from John Locke, <u>Two Treatises of Government</u> (1690)	1
Rose, "The Author as Proprietor: <u>Donaldson v. Becket</u> and the Genealogy of Modern Authorship" (1988)	2
Breyer, "The Uneasy Case for Copyright" (1970)	11
Lange, "Recognizing the Public Domain" (1981)	21
Fox, <u>Canadian Law of Copyright and Industrial Design</u> (1967)	36

B. LEGAL AND ADMINISTRATIVE FRAMEWORK

I. CONSTITUTIONAL FRAMEWORK

Constitution Act s. 91 (23)	41
-----------------------------	----

II. RELATIONSHIP BETWEEN STATUTE AND COMMON LAW

i) Statutory Provisions	41
ii) Comment	43

III. REGISTRATIONS AND NOTICE REQUIREMENTS (MARKING)

Advantages to Registration	45
Marking to Comply With <u>Universal Copyright Covention</u>	46
Registration Forms	47

IV. COLLECTIVE ADMINISTRATION OF COPYRIGHT

i) Statutory Provisions	49
ii) The Operation of Licensing Bodies	51
Agnew, "Using Artistic and Literary Works Under The New Copyright Act" (1989)	51
Neil, "Film/Tv/Video Production and Distribution" (1989)	68
Davies, "The Public Interest In Collective Administration of Rights" (1989)	72

V.	<u>JURISDICTION OF COURTS</u>	77
C.	<u>AUTHORSHIP AND OWNERSHIP OF COPYRIGHT</u>	
I.	<u>HISTORY</u>	
	Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'"	79
II.	<u>STATUTORY AND TREATY PROVISIONS</u>	
	i) Prerequisites for Copyright, s. 5(1)	89
	ii) <u>Berne Copyright Convention</u>	89
	iii) Minister may extend, s. 5(2)	89
	iv) <u>Universal Copyright Convention</u>	89
	v) Author first owner principle, s. 13 (1)	89
III.	<u>DETERMINING THE AUTHOR</u>	
	<u>Donoghue v. Allied Newspapers Ltd</u>	91
	<u>Kantel v. Grant</u>	96
	<u>Massie &amp; Renwick Ltd. v. Underwriters Survey Bureau Ltd</u>	107
IV.	<u>EXCEPTIONS TO AUTHOR AS OWNER PRINCIPLE</u>	
	i) Photographs	111
	ii) Records and perforated rolls	111
	iii) Crown works	111
	iv) Commissioned Works	112
	v) "Contract for Service"	112
	<u>University of London Press Ltd.</u>	113
	<u>Beloff v. Pressdam Ltd.</u>	116
	<u>Netupsky v. Dominion Bridge Co.</u>	122
	Note	122
	vi) Cinematographic work	123
V.	<u>ASSIGNMENTS AND LICENSES</u>	125

## D. PREREQUISITES FOR COPYRIGHT:

### I. ORIGINALITY

s. 5(1) "Copyright subsists in every <u>original</u> literary, dramatic, musical and artistic work."	127
<u>University of London Press Ltd.</u>	128
<u>Victoria Park Racing &amp; Recreation Grounds Co. Ltd. v. Taylor</u>	130
<u>Kilvington v. Goldberg</u>	130
Borges, "Pierre Menard: Author of the <u>Quixote</u> " (1962)	134
Foucault, "What is An Author?" (1984)	140
Hebdige, "Rap and Hip Hop: The New York Connection" (1987)	154
Pareles, "Digital Technology Changing Music" (1986)	163
Tim Tully, "A Sampling of Sampling" (1987)	164
Comments	166

### II. IDEA/EXPRESSION DICHOTOMY

<u>Moreau v. St. Vincent</u>	167
<u>Cuisenaire v. South West Imports Ltd.</u>	167
<u>Bulman Group Ltd. v. "One Write" Accounting Systems Ltd.</u>	169
<u>Horn Abbot Ltd. v. W.B. Coulter Sales Ltd.</u>	174
<u>Whelan Associates, Inc. v. Jaslow Dental Laboratory</u>	180
Poston, "All Puff and No Stuff: Avoiding the Idea/Expression Dichotomy" (1989)	186
Morris, "Expanding Proprietary Entitlements and the Public Interest in Dissemination of Art" (1989)	197
Sipos, "Warning All Authors! Your Own Style May Infringe Your Own Work" (1989)	200

### III. FIXATION

s.2 Definitions	209
<u>Canadian Admiral Corp. Ltd. v. Rediffusion Inc.</u>	209

Mosher, " Twentieth Century Music: The Impoverishment in Copyright Law of A Strategy of Forms" (1989)	218
--	-----

#### IV. SUBJECT MATTER

Statutory Provisions	232
i) <u>Literary Works</u>	
a) What is a literary work?	
<u>Hollinrake v. Truswell</u>	233
<u>Exxon Corp. v. Exxon Insurance Consultants</u>	238
<u>Express Newspaper v. Liverpool Daily Post</u>	242
b) Compilations	
<u>B.C. Jockey Club v. Standen</u>	246
<u>Elanco Products Limited v. Mandops</u> <u>(Agrochemical Specialists) Ltd</u>	250
<u>Canadian Admiral v. Rediffusion Inc.</u>	256
<u>Bulman Group Ltd. v. "One Write" Accounting</u> <u>Systems Ltd.</u>	256
c) Computer programs	
s.2 definition	257
<u>Apple Computer v. MacIntosh</u> (1986)	257
<u>Apple Computer v. MacIntosh</u> (1987)	258
<u>Whelan and Associates Inc. v. Jaslow</u> <u>Dental Laboratory, Inc.</u>	260
<u>NEC Corp. v. Intel Corp.</u>	264
Erdle, "Copyright in the look and feel of computer software"	267
ii) <u>Artistic Work</u>	
<u>D.R.G. Inc. v. Datafile Limited</u>	273



iii) Dramatic Work

<u>Kantel v. Grant</u>	281
<u>Canadian Admiral</u>	282
<u>Tom Hopkins International, Inc. v. Wall &amp; Redekop Realty Ltd</u>	284

iv) Musical Works and Sound Recordings

s. 5 (3) and (4)	289
<u>C.A.P.A.C. v. CTV Television Network Ltd</u>	290
<u>Canadian Performing Right Society v. Ford Hotel</u>	296

v) Other Works 303v) Non-Protected Works

## a) Titles

<u>Francis Day &amp; Hunter Ltd. v. Twentieth Century Fox Corp. Ltd.</u>	304
--	-----

## b) Names/Single Words

<u>Exxon Corporation v. Exxon Insurance Consultants Ltd.</u>	309
--	-----

## c) Individual Performer's Performances

<u>Nancy Sinatra v. Goodyear Tire &amp; Rubber Co.</u>	311
--	-----

Judge, "Protecting Performers' Performances in Light of the Canadian Charter of Rights for Creators"	314
--	-----

## d) Characters

<u>American Greetings Corp. v. Oshawa Group Limited</u>	327
---	-----

<u>Universal City Studios Inc. v. Zellers Inc</u>	332
---	-----

## e) Designs Applied to Useful Articles 340

## E. RIGHTS

i)	Rights Granted to Copyright Holders	
	s. 3 and s. 5 (4)	341
ii)	Rights Granted to Other Parties	
	s. 15 and 16-- compulsory licences	342
iii)	Public Exhibition Right	
	Korper, "Commercialization of Artistic and Printed Works" (1989)	344
iv)	Telecommunication Rights	
	Mc Donald, "Cable/Satellite Retransmissions in Canada--A New Era" (1989)	349
	<u>Canadian Admiral v. Rediffusion</u>	357
	Rodney C. Kyle, "Proposed Amendments to Canada's Copyright Act in the Act to Implement the Canada United States Free Trade Agreement" (1989)	364

## F. TERM OF COPYRIGHT

I.	<u>BASIC TERM OF COPYRIGHT</u>	371
II.	<u>EXCEPTIONS</u>	
	i) s. 7 - posthumous works	371
	ii) s.9(1) - joint works	371
	iii) s. 10 - photographs	372
	iv) s. 11 - record and perforated rolls	372
	v) s. 12 - crown	372
	vi) Anonymous Works	
	<u>Massie and Renwick v. Survey Bureau Limited</u>	372

## G. INFRINGEMENT

I.	<u>STATUTORY PROVISIONS</u>	373
----	-----------------------------	-----

## II. SUBSTANTIVE REQUIREMENTS FOR INFRINGEMENT

i) Comment	374
ii) Copying and Indirect Copying	375
iii) Subconscious Copying	
<u>Francis Day &amp; Hunter v. Bron</u>	378
"A Tale of Twin Spinsters" (1988)	385
<u>Gondos v. Hardy</u>	386
iv) Copying Under Pretence of Quotation	
<u>Zamacois v. Doucritte</u>	392

## III. SUBSTANTIAL PART OF A WORK

<u>Hawkes v. Paramount Film Services</u>	393
<u>Ladbroke Football Ltd. v. Hill Football Ltd.</u>	401

## IV. MECHANICAL CONTRIVANCES

<u>Hrycyk v. Smichure</u>	407
<u>Compo Co. Ltd. v. Blue Crest Music Inc.</u>	409
<u>Fly by Nite Music Co. Ltd. v. Record Warehouse Ltd</u>	416
<u>Warner Bros - Seven Arts Inc. v. CESM Ltd.</u>	421

## V. SALE, IMPORTATION OF OFFER FOR TRADE

s. 27 (4)	428
-----------	-----

## VI. PERMITTING USE OF PLACE OF ENTERTAINMENT

s. 27(5)	429
----------	-----

## H. EXEMPTIONS

### I. STATUTORY EXEMPTIONS

s. 27(2)	430
----------	-----

## i) Fair Dealing

Hubbard v. Vosper 433Zamacois v. Douville 436Beloff v. Pressdam 441The Queen v. James Lorimer & Co. Ltd. 446

## ii) Fair Use

Sony Corp of America v. Universal City Studios 450II. JUDICIALLY CREATED EXEMPTIONS: A PUBLIC INTEREST DEFENCE?Beloff v. Pressdram 465Lion Laboratories Limited v. Evans 467The Queen v. James Lorimer and Co. Ltd. 472I. REMEDIES

Statutory Provisions 474

Pro Arts Inc. v. Campus Crafts Holdings Ltd. 475IBM Corp. v. Ordinatains Spirales Inc. 487Nintendo of American, Inc. v. Cornex Video Games Inc. 490Sookman, "Civil Remedies" in Computer Law (1989) 498J. OFFENCES

Statutory Provisions 507

K. MORAL RIGHTS

Statutory Provisions 509

Snow v. The Eaton Centre Ltd. 511John Maryon International Ltd. v. New Brunswick Telephone 512

"Colored Movies Ruled Eligible For Copyright" (1987) 514

"Black and White and red all over" (1987) 515

"Colorization of films Insults Artists and Society"(1987) 516

"Artists Don't Deserve Special Rights" (1988) 517